STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v	No. 258928 Wayne Circuit Court
MICHAEL STOKES, Defendant-Appellant.	LC No. 04-007072-01

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 10 to 20 years' imprisonment for his conviction. We affirm.

Defendant argues that the jury should have been instructed to view the testimony of the victim, an admitted drug abuser, with caution because the prosecution's entire case rested on his testimony. Defendant did not request the court to give the cautionary instruction below, but instead, argues on appeal that the court erred by not giving the instruction sua sponte. We disagree. Defendant did not preserve this issue for appeal. When issues are unpreserved, this Court reviews the record for plain error affecting defendant's substantial rights, and will only reverse if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Generally, a trial court is not required to give sua sponte a limiting or cautionary instruction. *People v Atkins*, 397 Mich 163, 170-171; 243 NW2d 292 (1976); *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Here, the jury was sufficiently instructed on its obligation to determine the credibility of a witness and the factors it should consider when doing so. The court properly instructed the jury that it must decide which witnesses to believe and that it does not have to accept or reject everything a witness says. The court instructed the jury to rely on its common sense when weighing the testimony of a witness. The court also listed for the jury numerous questions to consider when deciding if a witness is worthy of belief, such as the witness's ability to see and hear clearly, whether the witness was distracted and whether the witness seemed to have a good memory. Defendant did not request a cautionary instruction below, and he did not object to the jury instructions when they were given.

The instructions the court gave were sufficient to adequately protect defendant's rights. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Thus, it was not plain error for the trial court to not sua sponte give a cautionary instruction regarding the victim's testimony.

Next, defendant argues that the trial court erroneously denied his request to instruct the jury regarding his theory of self-defense. We disagree. This Court reviews preserved claims of instructional error de novo. *Id.* A criminal defendant has the right to have a properly instructed jury. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). For that reason, "jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Here, defendant presented no evidence that warranted a self-defense instruction.

Generally, a person acts in self-defense if that person is free from fault and, under all the circumstances, he honestly and reasonably believed that he was in imminent danger of death or great bodily harm and that it was necessary for him to exercise deadly force. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). The prosecution presented testimony that clearly showed that defendant was the initial aggressor in this situation and defendant offered no evidence to prove otherwise. Defendant attacked the victim when he denied defendant's request for money. The victim testified that when he turned his back to leave the park, he felt a pinch. When he turned around, defendant hit him. The victim also testified that he did not have a weapon when defendant attacked him, and defendant presented no evidence to contradict the victim's testimony. Moreover, no evidence was presented from which to infer that defendant had an honest and reasonable belief that he was in imminent danger of death or great bodily harm and that it was necessary for him to exercise deadly force. Consequently, the trial court's refusal to grant defendant's request for a self-defense instruction was proper.

Defendant also argues that the trial court erred when it denied his motion for a directed verdict on the charge of assault with the intent to murder. We disagree. When reviewing a trial court's decision on a motion for a directed verdict, this Court examines de novo the evidence presented up to the time of the motion in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

To prove assault with intent to murder the prosecution must show that defendant committed: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Id.* Defendant argues that the evidence the prosecution presented was insufficient to prove the intent element of this offense. We disagree.

"The intent to kill may be proven by inference from any facts in evidence." *Id.* The necessary actual intent to kill may be proved by "'the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, [the defendant's] conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made.'" *People v Taylor*, 422 Mich 554, 368; 375 NW2d 1 (1985), quoting *Roberts v People*, 19 Mich 401, 416 (1870).

Given the circumstances surrounding the incident, a reasonable trier of fact could infer that defendant intended to kill the victim when assaulting him. Defendant would not let the victim leave the park after the victim denied defendant's request for money. The evidence shows that defendant continuously stabbed the victim, who was unarmed. A reasonable jury could infer from defendant's actions and the severity of the victim's injuries that defendant intended to kill the victim. Thus, the trial court did not err in denying defendant's motion for a directed verdict on the charge of assault with intent to murder. *Warren, supra* at 588.

Defendant argues next that the prosecution presented insufficient evidence to sustain his conviction for assault with intent to do great bodily harm less than murder. We disagree. This Court reviews de novo a claim of insufficient evidence by viewing the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Reasonable inferences from circumstantial evidence may be sufficient for rational trier of fact to find all of the elements of an offense beyond a reasonable doubt. *Id*.; *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The prosecution presented sufficient evidence to sustain defendant's conviction for assault with intent to do great bodily harm less than murder. The elements of assault with intent to great bodily harm less than murder are: (1) an assault, and (2) with intent to do great bodily harm less than murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). "[T]he elements of assault with intent to do great bodily harm less than murder are completely subsumed in the offense of assault with intent to commit murder." *Id*. at 150-151. Because we have already concluded sufficient evidence was presented from which a rational trier of fact could have found beyond a reasonable doubt all of the elements of assault with intent to commit murder, it follows that this same evidence was sufficient to sustain defendant's conviction of the necessarily included lesser offense of assault with intent to do great bodily harm less than murder. *Id*.; *Herndon, supra* at 415.

Defendant further argues that the verdict is against the great weight of the evidence. We disagree. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A new trial may be granted if a verdict is against the great weight of the evidence. MCL 770.1; MCR 6.431(B); 2.611(A)(1)(e). Here, defendant essentially argues the credibility of witnesses and the inferences to be drawn from the evidence. But, "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Further, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647.

We affirm.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello